The Law Society response to the Independent Human Rights Act Review call for evidence

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Summary

The Human Rights Act (HRA) is a subtle and carefully crafted legal instrument, containing mechanisms which work together to strike the right balance between the judiciary, executive and Parliament, and between the national legal order and the European Court of Human Rights (ECtHR). This framework is effective not only in upholding our constitutional balance of powers, but also in protecting the rule of law and ensuring access to justice without delay in the domestic courts.

While there is significant evidence to demonstrate the value of the HRA in its current form, we have not seen convincing evidence pointing to the need for its amendment. Significant amendment risks disrupting the overall balance that has been struck within the HRA and undermining access to justice and the rule of law.

The relationship between domestic courts and the ECtHR

The **section 2 duty** to 'take account' of ECtHR jurisprudence is important in enabling domestic courts to keep pace with the ECtHR and therefore avoid cases proceeding to the ECtHR. It also helps to maintain consistency for those that may operate across borders, such as businesses. Domestic courts have developed a sophisticated approach and only treat themselves as having a duty to follow ECtHR jurisprudence if there is a strong and consistent line of authority. Even where this exists, domestic courts have been willing to depart from ECtHR jurisprudence where they are satisfied that the ECtHR has not properly considered the UK's national context.

Evidence from case law shows that where the ECtHR would be likely to apply a wide **margin of appreciation**, the domestic courts have reached decisions based on their own appreciation of national context. They are sensitive to the limits of their competencies when doing so and defer to the executive and legislature when necessary.

Incorporation of the Convention rights through the HRA into domestic law has significantly enhanced **judicial dialogue** and allows the UK to play a greater role in shaping international human rights law and practice. The evidence shows that, overall, judicial dialogue is working well and there are strong examples of where domestic courts have defended the national position and influenced the further development by the ECtHR of its jurisprudence. Accepting Protocol 16 on advisory opinions could help further enhance judicial dialogue. However, this needs to be weighed against any potential for creating delays and the resulting impact this could have on access to justice.

The impact of the HRA on the relationship between the judiciary, the executive and the legislature

Sections 3 and 4 of the HRA strike the right balance between retaining the sovereignty of Parliament and ensuring swift access to justice. They are interdependent, therefore any amendment to one would have an impact on the use of the other. We do not consider there to be convincing evidence of the need to amend either provision. Altering the balance between section 3 and 4 in favour of increased use of declarations of incompatibility could cause delays and reduce protection for rights where political pressure may dissuade the legislature from taking remedial action.

In relation to section 3, statements of legislative compatibility with the HRA made under section 19 indicate parliamentary intent which it is reasonable for the judiciary to rely on when making an interpretation. The interpretative duty is already subject to restrictions and, ultimately, it is open to Parliament to change an interpretation it disagrees with through further legislation. Case law analysis shows that there have been no broad interpretations contrary to parliamentary intention employed under section 3 in recent years.

The ability to quash or set aside provisions of **subordinate legislation** or executive orders is well established in administrative law and justified by the need, grounded in democratic principles, for a robust system of checks and balances in the context of reduced parliamentary scrutiny. In relation to subordinate legislation, the courts rarely use this power and the need to do so is reduced by the section 3 interpretative duty.

In relation to **derogation orders**, the ability to challenge the validity of and quash a derogation order is an important safeguard. The discretion to award further damages ensures adequate remedies are available. However, this discretion is restricted, and evidence shows the courts use it conservatively.

Limiting **extraterritorial application** of the HRA would remove human rights protections for our own citizens stationed abroad, as well as foreign nationals subjected to acts of UK authorities. It would have perverse consequences for the advancement of human rights and for the rule of law and damage the UK's international reputation as a champion of human rights standards.

Remedial orders are used in moderation for minor amendments. Parliamentary scrutiny of remedial orders is provided by the Joint Committee of Human Rights, and further enhancing the role of Parliament should be weighed against the possibility of causing delays. Whether the remedial order process should be used to amend the HRA itself warrants examination, as the ability to amend a constitutionally significant measure such as the HRA by executive order could be problematic.

Introduction

1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards and the rule of law. We represent the profession to Parliament, government and regulatory bodies and have a public interest in the reform of the law. The Law Society is committed to upholding the rule of law and promoting access to justice. We have therefore approached this review, and the call for evidence before us, through this lens.

2. We welcome the opportunity to respond to this call for evidence. The Law Society's response has been informed by in-depth consultation with our members. It has been produced in collaboration with our expert Human Rights Committee as well as benefitting from consultation with further leading human rights practitioners from across the solicitors' profession.[1]

[1] We further gratefully acknowledge the research assistance of Lee Marsons, PhD candidate, Graduate Teaching Assistant and Research Assistant at the University of Essex and Co-editor of the UK Administrative Justice Institute blog (UKAJI)

3. The Human Rights Act (HRA) is a legal instrument of great constitutional importance. It confirms the rights and freedoms owed to all people in the UK and provides robust protection for these. Its legislative purpose was to give effect to the Convention rights in domestic law and to provide an effective remedy for breaches. Any reduction in the effectiveness of the HRA would undermine this purpose and the ability to protect fundamental rights, including through providing effective remedies. The Independent Human Rights Act Review (IHRAR) should be sensitive to this importance and the underlying aims of the HRA.

4. The HRA is a subtle and carefully crafted legal instrument, achieved through cross-party collaboration. It contains mechanisms which work together to strike the right balance between the judiciary, executive and Parliament, and between the national legal order and the European Court of Human Rights (ECtHR). In our response we seek to explain this balance and why compromises between competing interests, where they have been made in the HRA, are not only appropriate but necessary. They result in a framework that is effective in upholding our constitutional balance of powers, protecting the rule of law and ensuring access to justice without delay in the domestic courts. It serves to maintain, as far as possible, a consistent interpretation and application of human rights standards across Council of Europe member states while allowing the European Convention on Human Rights (ECHR) to be a living instrument which evolves over time and respects the specificities of the national contexts in which it applies.

5. While there is significant evidence to demonstrate the value of the HRA in its current form, we have not seen convincing evidence pointing to the need for its amendment. Significant amendment risks disrupting the overall balance that has been struck within the HRA and undermining access to justice and the rule of law. The panel should therefore approach this with caution.

6. We welcome the open approach the IHRAR panel have taken to engagement with stakeholders and publishing the evidence it receives. This will enable greater discussion and scrutiny of the review which is necessary for building consensus and ensuring trust in both the review and the HRA itself.

7. However, the scope of this review focuses on technical issues concerning the mechanics of the HRA. While this panel does not have an educative role, for its findings to be accepted they need to be understood by the public. Beyond this review, we believe the Government should consider options for a package of public education measures, designed to increase understanding of the protections provided by the HRA and its essential place in our constitutional system. In addition to consideration of the issues set out in its Terms of Reference, we suggest that the review panel relay the concerns of stakeholders regarding the scope of the review to Government.

8. An additional consideration is the impact that any amendment to the HRA could have on devolution. Convention rights are hard-wired into the DNA of the devolution settlements in Wales, Scotland and Northern Ireland.[2] Unlike the Westminster Parliament, each devolved legislature is subject to a red-line restriction from legislating contrary to the Convention rights incorporated in the HRA, and Ministers in each devolved Government are prohibited from acting incompatibly with those rights.[3] It follows that any change to the content or status of the HRA would shift the boundaries of the devolution settlements. In accordance with the Sewel Convention, the UK Government will normally seek the devolved legislatures' consent when inviting

[2] s.108A(2)(d) Government of Wales Act 2006; s.29(2)(d) Scotland Act 1998; s.6(2)(c) Northern Ireland Act 1998

[3] s.81 Government of Wales Act 2006; s.57(2) Scotland Act 1998; s.24(1)(a) Northern Ireland Act 1998

Parliament to alter devolved competence. We would expect the UK Government to honour that commitment, and not to proceed without consensus on an issue of such fundamental importance to the integrity of the Union. The panel should be similarly sensitive to this and remind the Government of these factors in its report.

9. Furthermore, the subject matter of 'human rights' is not reserved to the Westminster Parliament in any of the devolution settlements. There are several examples of the devolved Parliaments legislating to increase protections beyond those afforded in UK law, such as the incorporation of the United Nations Convention on the Rights of the Child in Wales. Consequently, there is the possibility of future variance in the extent to which human rights are embedded and protected in each constituent part of the United Kingdom, unless any reform to the HRA proceeds with the consent of each devolved legislature.

Theme 1: The relationship between domestic courts and the European Court of Human Rights (ECtHR)

How has the duty to 'take into account' ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

10. The section 2 duty to 'take into account' ECtHR jurisprudence establishes the relationship between domestic courts and the ECtHR. In doing so it recognises the dual position that this relationship is not a strict hierarchical one but that, at the same time, the ECtHR is the ultimate arbiter of the ECHR. This means that ECtHR jurisprudence may be the basis of a judgment or persuasive to a degree, but ultimately it is not binding in the same way as judicial precedent is within the UK's national legal system. While section 2 has undoubtedly had a significant impact, with judges now habitually referring to ECtHR jurisprudence, it is clear from judicial application that this remains the position taken in domestic courts in line with what section 2 intends.

11. ECtHR jurisprudence may not be binding, but that does not mean the duty to take account of it is meaningless – nor should it be. Section 2 in its current form is crucial to enabling domestic courts to keep pace with the jurisprudence of the ECtHR. It helps domestic courts to fulfil the parliamentary intention in passing the HRA[4], which is to avoid cases proceeding to the ECtHR when they could be resolved more swiftly in the domestic courts. Furthermore, it helps to maintain consistency across the states party to the ECHR. This is not only vital for advancing collective human rights standards – thus realising the ambition of the ECHR – but is important for providing those that may operate across borders, such as businesses, with legal certainty. The Law Society members who represent multinational businesses and organisations emphasise that this is becoming an increasing concern for their clients who value legal consistency and clarity and a strong national commitment to the rule of law.[5] Maintaining this link to evolving international standards is therefore an important factor in attracting international business investment.

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[4] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (Command Paper 3782, October 1997), para. 1.14-1.16. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

[5] See, for example: Linklaters, '*Enhancing the rule of law to ensure the UK remains competitive post-Brexit*' (2017), available at: https://www.linklaters.com/en/insights/thought-leadership/rule-of-law/the-rule-of-law; Bingham Centre for the Rule of Law and Hogan Lovells, '*Risk and Return: Foreign Direct Investment and the Rule of Law*' (2014), available at: https://binghamcentre.biicl.org/publications/risk-and-return-foreign-direct-investment-and-the-rule-of-law?cookiesset=1&ts=1614184307

12. We believe analysis of case law shows there is no need to amend section 2 of the HRA as domestic courts have developed nuanced positions on ECtHR jurisprudence depending on its strength, relevance, and compatibility with national principles and values.

Mirror principle

13. Analysis shows that the higher courts have developed a sophisticated interpretation of section 2 and as a result, domestic courts only have a duty to follow ECtHR jurisprudence if there is a strong and consistent line of authority. This is commonly referred to as the 'mirror principle' (that domestic decisions should reflect or 'mirror' those of the ECtHR), the classic explanation of which was provided by Lord Bingham in *R v Special Adjudicator ex parte Ullah*:

    "In the absence of some special circumstances, [the domestic court should] follow any clear and constant jurisprudence of the Strasbourg court…[A] national court subject to a duty as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law…The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."[6]

14. In practice, this has resulted in the highest domestic courts overturning previous domestic decisions in order to comply with the ECtHR's approach where a strong line of authority exists. For example, in *Manchester City Council v Pinnock,* applying the mirror principle led the Supreme Court to depart from a series of judgments made in the preceding decade on the scope of Article 8 in private possession proceedings.[7] The high point of the mirror approach is commonly referred to as *AF v Secretary of State for the Home Department (No 3)*, in the now somewhat infamous phrase from Lord Rodger: *"Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed."*[8]

15. However, as stated above, the mirror principle approach should not be viewed as counter to our national interests. Its primary purpose is to ensure that national human rights law develops in harmony with the regional system of which the UK is a member, thereby meeting UK obligations under the ECHR and reducing the likelihood of cases proceeding to the ECtHR. It bears repeating that this was one of the intentions behind enacting the HRA. The mirror principle recognises that the rights contained in the HRA are based on an international instrument – the ECHR – of which the ECtHR is the ultimate arbiter, as well as the merits of ensuring consistent application across borders.

Departing from ECtHR jurisprudence

16. It is equally important to note, however, that the mirror principle as expressed in *Ullah* does not require domestic courts to follow every decision of the ECtHR – only those where there is a strong, clear, and consistent line of authority. There will be many cases before the domestic courts where this doesn't exist. Even where this does exist there is still the significant caveat that "*special circumstances*" would justify domestic courts departing from ECtHR jurisprudence. In recent years we have seen a retreat from a strict application of the mirror principle in a growing number of examples where the domestic courts have shown willingness to depart from the ECtHR.

[6] R v Special Adjudicator ex parte Ullah [2004] UKHL 26, para.20

[7] Manchester City Council v Pinnock [2011] UKSC 6

[8] AF v Secretary of State for the Home Department (No 3) [2009] UKHL 28, para.98

17. Classic examples of domestic courts departing from ECtHR jurisprudence include *Horncastle*[9] (concerning the admissibility of hearsay evidence) and *Animal Defenders International.*[10] The latter case (concerning whether a statutory prohibition on political advertising is contrary to the Article 10 right to free speech) is notable due to its context and the reasoning applied. In this case, despite political free speech enjoying staunch protections in other countries and there being applicable ECtHR authority to the contrary, the court gave more weight to the value judgment of Parliament; that is, it is important to ensure a level playing field and safeguard against the manipulation of political issues through advertising according to who can best afford it.[11]

18. However, it is the case of *Hallam v Secretary of State*[12] that provides a substantial and instructive list of circumstances in which domestic courts are prepared to depart from ECtHR jurisprudence.[13] Firstly, a minority of the Justices suggested that the ECtHR authority was inapplicable on its facts.[14] Secondly, it was argued that there was no settled or consistent line of jurisprudence to follow.[15] Third, Lord Mance suggested that the ECtHR had misunderstood some aspect of domestic law.[16] Further secondary reasons for departing were also outlined: that the ECtHR authority was irrelevant to the outcome; that the authority was poorly reasoned;[17] that departure is acceptable where the court believes the ECtHR decision to be wrong, unjust or unfair.[18]

19. Where courts have declined to follow ECtHR jurisprudence, this is often expressed in no uncertain – and occasionally very bold – terms. Recent cases provide ample examples of this. In *Kaiyam v Secretary of State,* ECtHR authority was rejected as *"based on an over-expanded and inappropriate reading of the word "unlawful" in article 5(1)(a)".*[19] In *Poshteh v Royal Borough of Kensington and Chelsea,* the court felt ECtHR jurisprudence was based on weak and unconvincing reasoning and effectively called on the Grand Chamber to provide clarification.[20] Returning again to *Hallam,* ECtHR jurisprudence was criticised as being based on vague principles[21] and "not just wrong but incoherent".[22] Such stark wording should put paid to any notion that domestic courts slavishly follow the ECtHR's lead.

Where ECtHR jurisprudence is silent

20. There have inevitably been instances where domestic courts have had to decide cases where there is no directly relevant ECtHR jurisprudence. In *Moohan v Lord Advocate*, Lord Wilson stated:

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[9] R v Horncastle and Others [2009] UKSC 14

[10] R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15

[11] Brenda Hale, '*Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?'* (2012) HRLR 12:1(2012) 65-78, p.73-74

[12] R (Hallam) v Secretary of State for Justice [2019] UKSC 2

[13] These are helpfully summarised in Lewis Graham, 'Hallam v Secretary of State – Under what circumstances can the Supreme Court depart from Strasbourg authority?' (UKCLA, 4 February 2019). Available at: https://ukconstitutionallaw.org/2019/02/04/lewis-graham-hallam-v-secretary-of-state-under-what-circumstances-can-the-supreme-court-depart-from-strasbourg-authority/

[14] R (Hallam) v Secretary of State for Justice, paras. 70 and 137-138

[15] *Ibid.,* paras. 73, 79 and 126

[16] *Ibid.,* para. 58

[17] *Ibid.,* para. 85

[18] *Ibid.,* paras. 90 and 126

[19] R (on the applications of Haney, Kaiyam, and Massey) v The Secretary of State for Justice [2014] UKSC 66, para. 35

[20] Poshteh v Royal Borough of Kensington and Chelsea [2017] UKSC 36, para. 37

[21] R (Hallam) v Secretary of State for Justice, para. 46

[22] *Ibid.*, para. 90

"…where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right."[23]

21. There are good reasons for allowing this. It is a pragmatic approach and one which is not outside of the higher domestic courts' abilities. Even where ECtHR jurisprudence does not precisely fit a combination of facts *"this does not mean that [the] court cannot seek to extract specific principles from those decisions, and then apply them to the facts of the cases before [them].*[24] This is not something the courts do without limits – it is worth recalling that inapplicability on facts is a reason for departing from Strasbourg given in *Hallam* – but only where there are identifiable principles from which to make a logical inference. Such an approach is justified by the underlying aim of avoiding cases proceeding to the ECtHR. Preventing a domestic court from anticipating a finding in the ECtHR when it is clear how it would decide would require the domestic court to forge ahead with a judgment it knows will likely be incompatible with the ECHR. This would substantially increase the risk of those cases proceeding to the ECtHR and adverse findings being made against the UK.

22. Moreover, although the Convention can only be authoritatively interpreted by the ECtHR, in the national context the courts are tasked with applying the HRA. It cannot cede its domestic statutory responsibilities to the ECtHR and refuse to issue judgment because the ECtHR has not done so. A domestic court applying the domestic statute of the HRA must nevertheless take a view on whether a right has been violated.

Legal clarity and certainty

23. Some final considerations concern the potential impact of any amendments to section 2 on legal clarity and certainty. Firstly, it could be suggested that codification of the approach of courts to section 2 would enhance legal clarity. We do not believe this is necessary as the courts have reached a settled approach to section 2 that is appropriate. Codification could risk limiting the flexibility needed for domestic courts to weigh ECtHR jurisprudence with national law and processes to ensure a suitable outcome in a given case and allow development of the law.

24. There are further concerns regarding the potential impact of amendment on legal certainty. ECtHR jurisprudence has been influential on the development of UK human rights law. In some areas, such as fair trial rights, a significant body of principles is derived from ECtHR jurisprudence. If amendments were made that would remove or restrict the application of ECtHR jurisprudence this could then leave significant gaps in the law, creating uncertainty in the protection of fundamental rights.

Conclusion

25. In practice, domestic courts have developed a sophisticated interpretation of section 2 that allows for nuance. As a result, they only have a duty to follow ECtHR jurisprudence if there is a strong and consistent line of authority. Even where this exists, domestic courts have been willing to depart from ECtHR jurisprudence where they are satisfied that the ECtHR has not properly considered the UK's national context. This interpretation allows for legal consistency, helping to prevent cases proceeding to the ECtHR, while not inhibiting the domestic courts ability to defend the national position when necessary. We therefore do not believe there is a need to amend section 2.

[23] Moohan and another v The Lord Advocate [2014] UKSC 67

[24] Surrey County Council v P [2014] UKSC 19, para. 62

When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to states under that jurisprudence? Is any change required?

26. The margin of appreciation is a concept of international law which recognises that the role of international courts, such as the ECtHR, is secondary and subsidiary to domestic courts and institutions.[25] This acknowledges that, although creating core common standards, the Convention rights do not need to be applied "*uniformly*" and "*may vary in its application according to local needs and conditions*".[26] An issue being subject to a wide margin of appreciation does not mean that the rights do not apply at all, but that states enjoy a degree of latitude where the national authorities are better placed to interpret their content as it relates to their own domestic context. When applying the margin of appreciation, the ECtHR therefore defers the issue to the national authorities and does not go on to make its own assessment.

27. On this understanding, the margin of appreciation is not directly applicable in domestic courts and tribunals.[27] It is not for them to unilaterally decide how wide the margin is in a case, although they may infer where the parameters are. If it was the case that states could declare that a wide margin of appreciation exists and so the oversight provided by the ECtHR doesn't apply, the international rule of law would be undermined and the system underpinning the ECHR would break down.

28. This is not to say that domestic courts cannot disagree with the ECtHR and refuse to apply their jurisprudence where they believe that national law, or some element of the national context, requires them to do so. As discussed above, the domestic courts can and frequently do depart from ECtHR jurisprudence, often on these grounds.

The margin of appreciation and the domestic principle of deference

29. Where a wide margin of appreciation has been applied by the ECtHR, this does not automatically mean that the issue is left to the political branches of government. The issue becomes one for the domestic system as a whole to determine, including the courts. The House of Lords in *re P* held:

    "The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch."[28]

30. More recently, Lord Mance in *D v Commissioner of the Police of the Metropolis* stated:

    "… where the European Court of Human Rights has left a matter to states' margin of appreciation, then domestic courts have to decide what the domestic position is, what degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area."[29]

31. Where a wide margin of appreciation applies, the domestic courts therefore maintain their role in adjudicating on whether the executive or legislature has complied with the HRA. It has been argued by a previous president of the ECtHR that the fact that an issue has been held to be subject to a wide margin of appreciation should provide

[25] Handyside v United Kingdom, App. 5493/72, ECHR 1976, para. 48
[26] R v Director of Public Prosecutions ex parte Kebilene [2000] HRLR 93, para.115
[27] R (Steinfeld and Keidan) v Secretary of State for International Development [2018] UKSC 32, para. 28
[28] Re P (A Child) (Adoption: Unmarried Couple) [2008] UKHL 38, para. 37
[29] D v Commissioner of the Police of the Metropolis [2018] UKSC 11 Para. 153

added incentive for the domestic courts to consider it, to ensure sufficient legal scrutiny.[30]

32. When considering an issue within the margin of appreciation, the domestic courts apply the HRA's framework and the domestic principle of deference. They do not necessarily apply a stricter approach. It can be seen that the domestic courts are sensitive to the limits of their competencies and do frequently defer to the executive and legislature. A good example of this is *R (Nicklinson) v Director of Public Prosecutions*, which concerned the absolute prohibition on assisted dying in domestic statute.[31] Although the Justices unanimously held that the issue was one which the ECtHR would consider to fall within a wide margin of appreciation, they declined to find a violation of Article 8. This was on the grounds that not only was it a deeply contentious issue, it was one which Parliament was already actively considering and required a moral assessment which is best left to the democratically accountable legislature.

33. This is far from the only case where domestic courts have deferred on similar grounds. While it is difficult to be exhaustive, examples of areas where the courts have previously indicated that they are likely to show substantial deference to executive decisions include cases involving: policy choices dependent on party politics or political philosophy;[32] broad questions of economic and social policy;[33] welfare policy;[34] issues involving the allocation of finite public resources;[35] questions involving national security and immigration;[36] foreign affairs and diplomatic relations;[37] and policy preferences in the area of social security and welfare.[38]

The approach of domestic courts to issues within (or potentially within) the margin

34. In instances where the courts have decided that it is within their competency to adjudicate on an issue that could fall into a wide margin of appreciation, this is often grounded in national law or context. A similarly illustrative example is the often-cited case of *re P,*[39] which concerned a ban on unmarried couples from adopting in Northern Ireland. It was not clear whether the margin of appreciation would apply, there being ECtHR authorities in the slightly different context of adoption by homosexual couples to support either conclusion. However, this was held to be a secondary consideration given the weight of guidance provided by the national context – that adoption by unmarried couples was permitted in law in the other UK nations. A violation of Articles 8 and 14 was therefore found. Although this case is often referred to as an example of expansionist tendencies, it cannot be denied that this was a result of consensus that was already established domestically.[40]

35. This case also raises the question of how courts approach an issue that could, or would likely, be subject to a wide margin of appreciation but where the ECtHR has not yet

[30] Dean Spielmann, *'Whither the margin of appreciation?',* UCL – Current Legal Problems (CLP) lecture (20 March 2014). Available at: https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf

[31] R (Nicklinson) v Director of Public Prosecutions [2014] UKSC 38

[32] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras. 75-76

[33] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, para. 70

[34] *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16

[35] *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, para. 41

[36] *Rehman v Secretary of State for Home Department* [2003] 1 AC 153

[37] *R (Lord Carlile) v Secretary of State for Home Department* [2014] UKSC 60

[38] *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73

[39] Re P (A Child) (Adoption: Unmarried Couple) [2008] UKHL 38

[40] Brenda Hale, '*Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?'* (2012) HRLR 12:1(2012) 65-78, p.74-75

explicitly held so. Domestic courts do not routinely speculate as to whether an issue falls into the margin of appreciation as it is not a domestic concept. They are more likely to consider whether the national concept of deference is required without referring to international legal doctrines. However, the *Countryside Alliance* case does offer some indication of approach.[41] Here it was stated by Baroness Hale that "*when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states… this House should not attempt to second guess the conclusion which Parliament has reached."*[42] Furthermore, when deciding not to allow an expansive interpretation of Article 8, Lord Brown added that while it may be reasonable for states to assume a margin of appreciation when balancing competing rights, it is *"quite another [thing] to say that a comparable margin exists for determining whether the qualified right… is engaged in the first place."*[43] Drawing these two statements together, it can be seen that the courts approach issues likely to fall into a wide margin of appreciation with caution, and are inclined to allow a wider discretion to the executive and legislature. This can be explained by the awareness expressed by the courts that a disappointed claimant can appeal to the ECtHR, but the state cannot.[44]

Conclusion

36. The summary of these strands is then that, while the courts can and should decide issues within a wide margin of appreciation, they are careful to defer to the executive and legislature when necessary. Whether deciding to defer or choosing to pronounce their own judgment, both results are embedded in their assessment of the national context and what that requires. This is an appropriate approach and we therefore do not consider there is any amendment needed in relation to the margin of appreciation.

Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence, having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

37. Enabling domestic legal effect of Convention rights through the HRA has undoubtedly enhanced judicial dialogue between the domestic courts and the ECtHR significantly. By allowing UK courts to consider and apply the rights of the ECHR it provides the opportunity for them to be interpreted within the national context by those who are best placed to analyse national law. This enables the UK to play a far greater role in shaping international human rights law and practice. Indeed, this was one of the objectives of the HRA, it being said by the Home Secretary in the original *Rights Brought Home* White Paper in October 1997 that the HRA would enable "*British judges…to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe*."[45]

Notable examples of judicial dialogue

38. Evidence shows that, overall, judicial dialogue is working well and there are strong examples of where domestic courts have defended the national position and influenced development of ECtHR jurisprudence. Rare examples of where an issue

[41] R (Countryside Alliance) v Attorney General [2007] UKHL 52

[42] *Ibid.,* para. 126

[43] *Ibid.,* para. 141

[44] Al-Skeini v Secretary of State for Defence [2007] UKHL 26, para. 106

[45] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (Command Paper 3782, October 1997), para. 1.14. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

has left the Supreme Court and the ECtHR in different places have been overemphasised and settled largely to the satisfaction of the UK position.

39. The often-cited example of this originates in the ECtHR decision in *Hirst v UK*[46] where a blanket ban on the ability of prisoners to vote was held to contravene Convention rights. Although it took steps to consider amendment, the UK Government fundamentally disagreed with this finding. However, it engaged in enhanced dialogue with the Committee of Ministers and eventually the matter was resolved in 2018, with the Government introducing administrative changes which preserved the bar on convicted prisoners in custody from voting, but enabled offenders released on temporary licence to vote. While this example is often said to be evidence of the ECtHR overstepping, ultimately the resulting amendment to the ban was narrow (only affecting "up to 100 offenders at any one time"[47]) and accepted by Parliament. The fact that the matter had to be resolved through executive engagement could also be alleged as laying bare the limits of judicial dialogue. This much is true but cannot be said to be an incorrect approach. Where there is fundamental disagreement from the executive and legislature to an adverse finding of the ECtHR, it is right that this is resolved by them, not the judiciary, in order to respect the constitutional balance of powers.

40. Awareness of this was seen in related cases brought before domestic courts during the intervening time between *Hirst* and the resolution in 2018. In *Smith v Scott*, a declaration of incompatibility was made in order to refer the decision to the legislature.[48] The court in the subsequent case of *Chester* declined to issue a further declaration in recognition of the fact that the matter was being considered by the executive and legislature.[49]

41. Despite the prisoner voting rights example being one that has gained a lot of attention, it is nevertheless an exception to the cooperation that is more generally fostered by judicial dialogue. There are strong instances where it can be seen that analysis provided by domestic courts has influenced the ECtHR causing them to amend or adapt previous findings and lines of jurisprudence.

42. The prime example of this is *Horncastle*[50] and *Al-Khawaja*[51] concerning the admissibility of hearsay evidence. The Supreme Court in *Horncastle* disagreed with the ECtHR, stating that it had not *"sufficiently appreciat[ed] or accommodat[ed] particular aspects of our domestic process".*[52] It therefore declined to follow the ECtHR authority, explicitly saying that doing so would likely encourage the ECtHR to reconsider the matter *"so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg court*".[53] The Supreme Court was quickly proved right, as *Al-Khawaja* was at that same time being heard by the ECtHR Grand Chamber. The Grand Chamber carefully considered the Supreme Court's judgment and as a result modified its approach, accepting that appropriate safeguards could exist that would allow acceptance of hearsay evidence.

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[46] Hirst v United Kingdom (No 2), App. 74025/01, ECHR 2005

[47] See: https://hansard.parliament.uk/Commons/2017-11-02/debates/9E75E904-9B25-475F-87C4-DD8F3C4836C4/Sentencing

[48] Smith v Scott [2007] CSIH 9

[49] R (Chester) v Secretary of State for Justice and another [2013] UKSC 63

[50] R v Horncastle [2009] UKSC 14

[51] Al-Khawaja and Tahery v United Kingdom, Apps. 26766/05 and 22228/06 [2011] ECHR 2127

[52] R v Horncastle [2009] UKSC 14, para. 11

[53] *Ibid.*

43. A similar exchange can be seen in the context of mandatory whole life sentences. In *R v McLoughlin and R v Newell*[54] the Court of Appeal rejected the ECtHR finding in *Vinter v UK*[55], that mandatory whole life sentences for murder were contrary to Article 3. In doing so, they carefully laid out in detailed reasoning the national processes that allowed for exceptions and for review of the sentence. When the issue returned to the ECtHR in *Hutchinson v UK* this reasoning was accepted, it being stated that:

    "Where, following the Grand Chamber's judgment in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court's interpretation of domestic law."[56]

Enhancing judicial dialogue

44. These latter examples show that the best way to enhance judicial dialogue where it is anticipated that a case will proceed to the ECtHR is for domestic courts to provide full and detailed reasoning, including clear analysis of national law, procedures and context.[57] In doing so, it is necessary to engage with the previous reasoning of the ECtHR, and when applying or disputing this, providing explanation to support their decision. Engaging with ECtHR reasoning in this way often results in a deeper analysis of ECtHR jurisprudence and greater clarity of the fundamental principles. However, no change – legislative or otherwise – is needed to achieve this, as domestic courts already engage in this type of analysis and provide detailed reasoning in their judgments.

45. It is also not only within the hands of the courts to enhance judicial dialogue. The legislature can support both the domestic courts and ECtHR in their reasoning by including comprehensive discussion of rights issues arising in legislation during parliamentary deliberations. The effectiveness of this can be seen in *Animal Defenders International v UK* where in deciding the proportionality of the measures concerned, the ECtHR considered not only the domestic judgment but also parliamentary discussions and a report from the Joint Committee of Human Rights (JCHR).[58] Again, consideration of rights issues by the legislature routinely happens, but ways in which this could be enhanced should be considered when legislation is being brought forward that does or could impact human rights.

46. One further opportunity relevant to judicial dialogue warrants consideration by the review panel. Ratification of Protocol 16 to the ECHR would allow (but not require) senior courts to request an advisory opinion from the ECtHR, which would be non-binding. This could create more opportunity for judicial dialogue. Seeking an advisory opinion could help avoid cases proceeding to the ECtHR, or where the opinion is disputed by the domestic court, encourage domestic judges to present detailed reasoning based on the national context which has led them to that conclusion. The first advisory opinion took only six months to be made, suggesting the ECtHR is capable of issuing an opinion relatively quickly.[59] However, the benefits of an advisory opinion nonetheless need to be weighed against any potential for delays. Access to justice in the domestic courts should be a priority, so it will be necessary to evaluate

[54] R v McLoughlin and R v Newell [2014] EWCA Crim 188

[55] Vinter and others v United Kingdom, Apps. 66069/09, 130/10 and 3896/10, ECHR 2013

[56] Hutchinson v. the United Kingdom, App. 57592/08, ECHR 2016, para. 25

[57] Alison L Young, Democratic Dialogue and the Constitution (2017)

[58] Animal Defenders International v United Kingdom, App. 48876/08, [2013] ECHR 362

[59] Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Request no. P16-2018-001, ECHR 2019

any possible impact on the ability of domestic courts to provide justice swiftly for those who consider their Convention rights to have been violated.

Conclusion

47. Overall, judicial dialogue between domestic courts and the ECtHR is working well. Enhancing judicial dialogue can be achieved without legislative or administrative change, but by encouraging best practice in the provision of robust judicial reasoning and explicit parliamentary consideration of rights issues in the national context. Ratifying Protocol 16 provides an additional option for enhancing dialogue but should first be examined to determine whether there could be adverse impacts on swift access to justice.

Theme 2: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

Should any change be made to the framework established by sections 3 and 4 of the HRA?

48. Sections 3 and 4 of the HRA are the key mechanisms which determine the approach domestic courts should take to legislation that raises compatibility issues. They are the main remedies available under the HRA and are interdependent, therefore any amendment to one would have an impact on the use of the other.

49. The Law Society believes that the balance that has been struck in the relationship between the judiciary, executive and legislative in sections 3 and 4, both in statutory drafting and through their use by the courts, is appropriate and there is no need for amendment. They create a workable framework which respects parliamentary sovereignty and provides strong protection for individual rights.

Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

50. Section 3 places a duty on domestic courts and tribunals to interpret both primary and secondary legislation compatibly with the HRA "*so far as is possible to do so*". It is a cornerstone of the framework created in the HRA and invaluable in providing robust protections for the rights contained within it. In comparison with declarations of incompatibility (which are used when a section 3 reading is not possible), it is significantly stronger as it allows an immediate remedy to the individual, therefore ensuring swift access to justice. Above and beyond this, its effect is to mainstream rights protection, embedding it into our legal system and allowing unforeseen consequences of legislation or oversights within it to be corrected with minimal disruption to Parliament. Indeed, creating a 'culture of human rights' was part of the original objective of the HRA, and section 3 makes a significant contribution to this.

51. The duty placed on courts by section 3 is undoubtedly a broad one. This has caused concern about its potential for use in a manner that is inconsistent with the intention of Parliament as expressed in the legislation it is being applied to. The key case in which this is raised is *Ghaidan v Godin-Mendoza.*[60] Here what is meant by the term 'possible' in section 3 was considered, in order to determine the scope of the duty. The notion that judges were restricted to resolving ambiguities was rejected as too narrow. The

[60] Ghaidan v Godin-Mendoza [2004] UKHL 30

court instead explained that section 3 is *"of an unusual and far-reaching character",* continuing on to say:

"Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear […] Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation."[61]

52. However, it also considered the limits of this:

"Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation […] The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed."[62]

Therefore, while the duty may require the court to provide an interpretation that departs from the original parliamentary intention behind the provision, this must remain grounded in the overall purpose of the legislation and be limited by it.

53. Somewhat understandably, this has raised some concern about compatibility with the principle of parliamentary sovereignty. However, much of this is overstated. Section 19 of the HRA requires the Government to issue a statement of compatibility when introducing legislation. Where this confirms compatibility with the HRA, it is reasonable to presume that Parliament intended to legislate compatibly and to give effect to section 3 in that light. Furthermore, clear and unambiguous statutory language is still capable of preventing a section 3 interpretation, in which case a declaration of incompatibility must be made, and the matter referred back to the legislature.

54. It must also be noted that deciding a case against parliamentary intention is not something courts do with any frequency. There have certainly been no instances of broad section 3 interpretations in recent years; besides *Ghaidan v Godin-Mendoza* and *R v A*[63] (an early case decided in 2001), there are few notable examples. Moreover, it always remains open to Parliament to legislate to change an interpretation provided by the courts with which it disagrees – therefore the ultimate sovereignty of Parliament is maintained.

55. When employing section 3 interpretations, courts remain sensible of their limits and will decline to provide an interpretation where doing so would transgress their competencies. Examples of this can be found in *Bellinger v Bellinger*[64] (where a section 3 interpretation was specifically denied because the court considered it would cross the line from interpreting to legislating) and *Nicklinson*[65]*,* discussed above. This arguably acknowledges another element of what it means for an interpretation to be 'possible' – that it must be possible within the courts' competencies.

Conclusion

56. Overall, we do not consider that section 3 poses a threat to parliamentary sovereignty. Conversely, the effect of repealing or significantly amending section 3 should not be underestimated. Doing so would significantly weaken the protection of fundamental rights that it offers, as well as upsetting the balance that allows the other mechanisms

[61] *Ibid.,* para. 30
[62] *Ibid.,* para. 33
[63] R v A [2001] UKHL 25
[64] Bellinger v Bellinger [2003] UKHL 21
[65] R (Nicklinson) v Ministry of Justice [2014] UKSC 38

provided in the HRA to work effectively. This is discussed in more detail in relation to declarations of incompatibility and remedial orders; however, to summarise, it would place greater reliance on these mechanisms resulting in delays which would undermine access to justice. The Law Society therefore does not consider that an amendment to section 3 is necessary.

If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

57. As stated above, we do not believe that section 3 should be amended or repealed.

58. It is difficult to anticipate the implications of applying an amendment to legislation enacted before the amendment takes effect, without first knowing what the amendment would require. However, we note that there is a general presumption against retrospective effect and add that, should this be permitted, it should not result in unfair outcomes or unduly restrict the protection of rights.

Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

59. Declarations of incompatibility under section 4 of the HRA are interdependent with the section 3 interpretative duty, as the discretion to issue a declaration arises when the court considers that it is not possible to interpret the legislation in question compatibly. They are an important solution to maintaining parliamentary sovereignty, acknowledging that our courts are not the constitutional courts seen in other jurisdictions, and so do not have the power to overturn primary legislation. A declaration of incompatibility does not affect the validity of the infringing legislation, which remains enforceable until amended by Parliament. There is also no legal obligation on the executive to take remedial action, nor for Parliament to accept any measures it may propose. When read together with section 6(3)(b), which excludes Parliament from the definition of a public authority that is obliged to act compatibly with Convention rights, it is clear that Parliament is free to legislate even in a way that is contrary to these rights.

60. The mechanisms provided by section 4 therefore already robustly protect parliamentary sovereignty. Nevertheless, there are arguments that their increased use would further enhance parliamentary sovereignty and the role it plays in rights protection. The most convincing of these is that declarations of incompatibility could be used to a greater extent where the rights issue at hand is a 'watershed' or 'contestable' one.[66] However, there is some evidence to suggest that where a rights issue is particularly sensitive, lacking consensus or politically 'live' then the courts are more likely to show deference and find in the Government's favour, rather than issue a declaration of incompatibility. Examples of this can be found in the cases of *Chester*[67] (concerning prisoners voting rights) and *Nicklinson*[68] (assisted dying). This would then suggest that the problem is not that the judiciary fails to defer to the political branches when it should, but that at times it over-defers.[69]

[66] Alison L Young, Democratic Dialogue and the Constitution (2017), p.222-226
[67] R (Chester) v Secretary of State for Justice [2013] UKSC 63
[68] R (Nicklinson) v Ministry of Justice [2014] UKSC 38
[69] See: https://publiclawforeveryone.com/2014/06/26/the-right-to-die-deference-dialogue-and-constitutional-authority/

61. To the extent that the argument in favour of using declarations of incompatibility for contestable rights issues remains, this is already within the courts discretion to do so. A court could decline to provide a section 3 interpretation on the grounds that this would transgress their competencies, and instead issue a section 4 declaration. With reference to the answers given above, we have seen no significant evidence to suggest that the courts are unwilling to do this.

62. It is true that in practice, declarations of incompatibility are sparsely used. A Government report prepared for the JCHR shows that 43 declarations have been issued throughout the lifetime of the HRA.[70] This may appear to support the suggestion inferred from this question that the current balance between sections 3 and 4 has not allowed Parliament a significant enough role in remedying infringing legislation. In fact, this is the very balance that was intended in the drafting of the HRA – and with good reason. While in principle, a greater role for Parliament is constitutionally acceptable, this could have adverse consequences.

63. Declarations of incompatibility are a crucial part of the HRA framework, but they are a much weaker form of rights protections and do not provide an effective individual remedy. The ECtHR has previously stated that declarations of incompatibility (without an accompanying constitutional convention that the executive and legislative are required to respond) are not an effective remedy due to their non-binding nature.[71] While the Government has so far always responded – and indeed, there is analysis on whether a convention to do so is emerging[72] – there remains the possibility that they will not always do so. Significantly shifting the balance to engender a substantial increase in the use of declarations of incompatibility would therefore put a larger number of confirmed human rights breaches in the precarious position of possibly being left unaddressed. On contentious issues where public opinion is against acting to rectify an identified rights breach, political pressure may persuade the executive and Parliament not to act, therefore allowing rights violations to continue unaddressed.

64. Furthermore, increasing use of declarations of incompatibility could have practical implications that would undermine the effectiveness of our national system of human rights protections. Should there be a substantial increase in the number of declarations requiring the legislature's attention this would increase pressures on the parliamentary timetable, creating delays. Significant delays in remedial action being taken by the executive and legislature already exist, with it taking upwards of 2 years for a resolution to be achieved in many cases.[73] As declarations of incompatibility do not affect the validity of the infringing legislation, this means there is a continuing breach of human rights obligations that could affect people beyond the original litigant, and that the original litigant is deprived of a remedy throughout the duration of any delay. This possible impact on the effectiveness of section 4 would then increase the likelihood that the disappointed litigant would resort to seeking those remedies before the ECtHR.

Conclusion

65. The Law Society therefore believes that the balance that is struck between the courts and legislature in sections 3 and 4 is the appropriate one. They provide a workable

[70] Ministry of Justice, *'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020'* (2020), p.30. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf.pdf

[71] Burden and Burden v UK, App. 13378/05, ECHR 2008, para.40 and 43

[72] Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' (2015), p.23-29 Available at: https://discovery.ucl.ac.uk/id/eprint/10072227/

[73] *Ibid.,* p.5-8

framework that ensures both robust protections for human rights and respect for parliamentary sovereignty, and do not require amending.

What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

66. Section 14 of the HRA requires a Secretary of State to make an order to give a derogation domestic legal effect. In doing so, this brings a derogation made to the ECHR within the national legal sphere, giving domestic courts the power of legal review. Given the potentially extreme effects of derogations in modifying or suspending the state's obligations to secure certain rights, this element of legal scrutiny is a vital safeguard to ensure their proper use only when absolutely necessary.

67. By their very nature, derogations are exceptional, their use being reserved for emergency situations that "*threaten the life of the nation*".[74] They therefore do not arise often, and the need for a court to review them, even less so. However, even in times of emergency the rule of law must be upheld. Where a case concerning a derogation comes before the courts, it is crucial that they are able to consider the order substantively for the review to be meaningful. This was expressed by Baroness Hale in her judgment in *A v Secretary of State for the Home Department*:

    "The courts' power to rule on the validity of the derogation is another of the safeguards enacted by Parliament in this carefully constructed package. It would be meaningless if we could only rubber-stamp what the Home Secretary and Parliament have done."[75]

68. As is similarly acknowledged by Baroness Hale in her judgment, the power of review in relation to derogation orders is restricted to considerations that are within the courts' competencies and the limits set by our constitutional balance of powers.[76] In matters concerning national security, this is an especially pertinent factor to which courts will have a heightened sensitivity when conducting their review. This is evident in the outcome of *A v Secretary of State for the Home Department*, where the judges refused to be drawn on whether there existed a public emergency within the definition of Article 15 ECHR.

69. Derogation orders can give rise to two strands of legal challenge: firstly, to the validity of the derogation order itself and, secondly, for a claim alleging a breach of human rights obligations arising from measures brought in under the order. The remedies available in each instance will fit the circumstances.

Quashing derogation orders

70. Challenging the validity of a derogation order may result in that order being quashed if it is found to be unlawful. It is right that the courts have the ability to do so where there are good reasons. The power to quash or set aside orders made by the executive is well established in administrative law. This is justified by the greatly reduced amount of parliamentary scrutiny such orders receive – which is more often than not very minimal – and the need, grounded in democratic principles, for robust checks on executive power. In the context of derogation orders this safeguard is all the more vital, given the far-reaching consequences for human rights standards and protections.

71. It is important to note that the courts do not use this power lightly. As mentioned above, in *A v Secretary of State for the Home Department* the judges approached the matter

[74] Article 15(1), European Convention on Human Rights

[75] A and Others v Secretary of State for the Home Department [2004] UKHL 56, para.226

[76] *Ibid.*

cautiously, showing great sensitivity to the limits of their competencies by refusing to rule on whether there existed a public emergency reaching the required threshold. While they did judge that the order in question should be quashed, this was on grounds that it breached the Article 14 duty of non-discrimination. The refusal to adjudicate on the substantive issue attracted a fair amount of criticism that the judges had been too cautious, and that it was within their remit to consider whether a public emergency satisfying the criteria laid out in Article 15 ECHR existed.

72. While the judges did not consider it right to do so in this case, the inclusion of criteria laid down in law means it should still remain open to them to consider whether a public emergency exists in future cases where the context requires it. To once again borrow the words of Baroness Hale:

    "Unwarranted declarations of emergency are a familiar tool of tyranny. If a Government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so."[77]

73. The approach indicated in this statement is again a restrained one. The use of the term "*patently*" clearly suggests that there would need to be very strong reasons for the court to intervene on these grounds, it being obvious that the power to derogate has been abused. In such a circumstance, it would be right to quash a derogation order to defend democratic values and protect human rights standards.

Individual damages

74. In respect of a claim alleging a breach of human rights obligations arising from measures brought in under the order, the courts have discretion under section 8 HRA to award individual damages. It is important that this discretion be available to the courts to ensure an effective remedy can be provided. Infringements that could arise in the context of derogation in times of public emergency are more likely to affect the life, liberty, safety and security of individuals, such that removing the offending order may not be sufficient to compensate the harm done.

75. The ability to make an award is limited by the terms of section 8, which requires that any other remedies awarded are taken into consideration. This encourages courts to view the remedies awarded as a package, and damages are only to be granted where it is necessary for just satisfaction. Once again, in the example of *A v Secretary of State for the Home Department* the derogation order was quashed but the judges declined to award damages (although a reduced award was later made by the ECtHR). Although there was no discussion of why damages weren't appropriate in this instance, it demonstrates that courts take a conservative approach in respect of awarding remedies in cases involving derogation orders.

Conclusion

76. The Law Society therefore believes that the remedies available to domestic courts when considering challenges to derogation orders are sufficient and appropriate. Courts are sensitive to the limits of their competencies and take an altogether moderate approach when awarding remedies in these cases.

Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

[77] *Ibid.*

77. Subordinate legislation, like primary legislation, is subject to the section 3 interpretative duty. This means that, as far as is possible to do so, courts and tribunals must read subordinate legislation compatibly with the HRA Convention rights. However, the HRA draws a clear and careful distinction between primary and secondary legislation. Unlike primary legislation, where subordinate legislation cannot be read compatibly with the HRA under section 3, courts have the ability to either quash the whole regulations in some circumstances or set aside the offending part of the legislation.

78. This is not unique to the HRA. The ability to quash or set aside provisions of secondary legislation is a power that already exists in administrative law, where it has been long established as a remedy available in judicial review.

79. Concerns that courts use this ability too willingly and that the HRA has encouraged this are not supported by evidence. It is a discretionary remedy, and therefore a finding that secondary legislation is incompatible with the HRA does not always mean it will be overturned. Case law analysis shows that courts take a conservative approach to subordinate legislation and rarely use their power to quash or set aside provisions. In fact, analysis shows that domestic courts have only exercised this power 14 times in the past 7 years in respect of the HRA, being more likely to award other remedies.[78] Furthermore, even where this power is used by the courts, they do so restrictively and, wherever possible, limit their finding to setting aside the relevant provisions, rather than quashing the whole order.

80. As stated above, the ability to quash or set aside provisions of subordinate legislation only arises where a section 3 interpretation is not possible. The interplay with the section 3 interpretative duty is therefore important, as it reduces the need to exercise this power. This again demonstrates how the remedies available under the HRA provide a balanced framework of measures to protect fundamental human rights. Any amendment to section 3 – which we do not consider necessary – would potentially increase instances where secondary legislation is quashed or set aside.

81. The ability to quash or set aside a particular provision in subordinate legislation is an important check on executive authority. As the HRA is an important constitutional measure, it is right that the courts are empowered to protect the rights contained within it from executive overreach by setting aside infringing parts of incompatible secondary legislation.

82. Furthermore, doing so is a key part of maintaining a proper democratic balance of powers. Unlike primary legislation, subordinate legislation is not subject to full parliamentary scrutiny, so the legislature's ability to evaluate any human rights implications is significantly reduced. Often when such legislation is examined by the courts it is the first time it will have received rigorous scrutiny. As stated, the distinction between the status of primary and secondary legislation is respected within the HRA and there are appropriate limits to quashing powers. Where secondary legislation is dependent on primary legislation or removing it would otherwise require the amending of primary legislation or affect its operation, the ability to quash or set aside the secondary provisions does not apply.

Conclusion

[78] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', U.K. Const. L. Blog (22nd Feb. 2021). Available at: https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/

83. We therefore consider that the ability of courts and tribunals to quash or set aside provisions of secondary legislation is appropriate and used conservatively, so we do not believe there is a need for amendment.

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

84. As domestic legislation, the HRA primarily applies to acts within the UK. There are limited circumstances in which it is applicable to acts of public authorities taking place outside the territory of the UK, primarily in the context of overseas military operations. This is by virtue of ECtHR case law (including judgments against the UK) which has clarified the circumstances in which extraterritorial application of the ECHR is valid. The application of this jurisprudence domestically was confirmed by the Supreme Court in the 2013 case *Smith and Others v Ministry of Defence*.[79] The Law Society does not believe there is a convincing case for changing the current position.

Where extraterritorial jurisdiction exists

85. The ECHR does not include provision relating to its specific territorial reach. Instead, the starting point in Article 1 states that the Convention rights must be secured by member states to "*everyone within their jurisdiction"*. This is an important distinction because, while 'territory' refers to a geographical area, 'jurisdiction' is a wider concept denoting a particular sphere of legal competence which is not necessarily confined by national borders. While jurisdiction has been held to be primarily territorial,[80] a number of exceptions are now well established in law.

86. The jurisprudence on when and in what circumstances jurisdiction may arise outside of the national territory was clarified in *Al-Skeini v UK*[81], which continues to provide authoritative guidance on when the ECHR applies to acts of public authorities taking place outside their national territory. Firstly, a state will be held to have established jurisdiction when "*as a consequence of lawful or unlawful military action*" they exercise "*effective control*" over an area outside of its national territory.[82] First established in *Loizidou v Turkey,*[83] this form of jurisdiction is considered to be more complete as it requires substantial control over an area as a whole, and as a result entails the obligation to ensure the full range of Convention rights.[84] Whether the level of control required exists is a question of fact, with key indicators being the strength of military presence in the area and/or the level of military, economic and political support for the local administration.[85]

87. The second category of exceptions relates to where a state agent is exercising authority or control and is well established in law. Within this category there are three circumstances acknowledged to establish jurisdiction for the purposes of applicability of Convention rights. Firstly, acts of diplomatic or consular agents may amount to an exercise of jurisdiction when these agents exercise authority or control over others.[86] Secondly, jurisdiction can be established where a state exercises public powers in a

[79] Smith and Others v Ministry of Defence [2013] UKSC 41
[80] Bankovic & Ors v Belgium & Ors, App. 52207/99 ECHR 2001, para. 59
[81] Al-Skeini v. United Kingdom, App. 55721/07, ECHR 2011
[82] *Ibid.*, para. 138
[83] Loizidou v Turkey, App. 15318/89, ECHR 1995
[84] Al-Skeini v United Kingdom, App. 55721/07, ECHR 2011 para. 138
[85] *Ibid.,* para. 139
[86] *Ibid.,* para. 134

foreign territory with the consent, invitation or acquiescence of that Government.[87] This is an instance similar to the 'effective control' exception, but where the level of control is not as substantial. Examples would include where responsibility is assumed for some, or all, of the executive or judicial functions, including policing or operating courts.

88. Lastly, in some cases, the exercise of authority and control through the use of force by a state agent operating outside of the national territory, can bring the person brought under control within the jurisdiction of the ECHR.[88] This most commonly arises in the context of detention; however, use of force is not limited to physical force.[89] Examples of where this jurisdiction has been established include capture and detention of an individual by security forces or officials,[90] detention in a prison controlled by a foreign state,[91] and seizure of a foreign vessel.[92]

89. An important distinction was made by the Grand Chamber judges in relation to the extent to which the Convention rights apply in circumstances falling within the state agent authority and control category. It held that Convention rights can be "*divided and tailored*"[93], with the effect that the controlling state is only obliged to secure the rights and freedoms that are relevant to the situation of the individual. This is most likely to include obligations to secure rights under Articles 2, 3 and 5, but may extend to others depending on the circumstances. This is a practical and measured acceptance of the realities in which this type of jurisdiction would arise and prevents an unfavourable situation whereby rights are applied in an 'all or nothing' manner. While it may not be possible, or even desirable, for a foreign state acting outside of their territory to be obliged to secure the full range of Convention rights, this does not mean that no human rights duties are owed, or that those that are owed should not be secured.

90. A further implication of the judgment in *Al-Skeini* is that the controversial concept of the 'espace juridique*'* was abandoned. This concept, applied earlier in *Bankovic,* would limit the applicability of Convention rights even when applied extraterritorially to the territory of those states party to it. The judges in *Al-Skeini* dismissed that the ECHR was limited in this way, accepting extraterritorial jurisdiction extended wherever the conditions outlined are satisfied. In this case it was applied in Iraq and has been further applied in other cases to acts taking place in Kenya[94], Iran[95] and the UN neutral buffer zone in Cyprus[96].

Domestic application

91. Domestically, *Al-Skeini* was applied by the Supreme Court in *Smith and Others v Ministry of Defence.*[97] This pivotal case, otherwise known as the Snatch Land Rover case, involved a series of claims brought by the relatives of soldiers killed while on duty in Iraq. They alleged a breach of obligations under Article 2 for failing to provide suitable military equipment.

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[87] *Ibid.,* para. 135
[88] *Ibid.,* para. 136
[89] Al-Saadoon & Ors v Secretary of State for Defence [2016] EWCA 811
[90] Ocalan v Turkey, App. 46221/99, ECHR 2005; Issa and Others v Turkey, App. 31821/96, ECHR 2004
[91] Al-Saadoon and Mufdhi v the United Kingdom, App. 61498/08, ECHR 2009
[92] Medvedyev v France App. 3394/03, ECHR 2010
[93] Al-Skeini v. United Kingdom, App. 55721/07 ECHR 2011, para. 137
[94] Ocalan v Turkey, App. 46221/99, ECHR 2005
[95] Pad and Others v Turkey, App. 60167/00, ECHR 2007
[96] Isaak v Turkey, App. 44587/98, ECHR 2008
[97] Smith and Others v Ministry of Defence [2013] UKSC 41

92. While accepting that the judgment in *Al-Skeini* did not directly apply to the circumstances in *Smith and Others* – the victims themselves being state agents, rather than Iraqi civilians – the Court stated that it provides clear authority and a framework for national courts to follow when deciding issues of extraterritorial application of Convention rights.[98] Although it did not rule on whether there had been a violation on the facts, the Supreme Court unanimously held that the soldiers were within the UK's jurisdiction for purposes of the ECHR at the time of their deaths. It held that applying the state agent authority and control exception to cover armed forces personnel was a logical extension, because a state's extraterritorial jurisdiction over local inhabitants through this exception only exists because of the jurisdiction it already has over its state agents – in this case, the soldiers that were killed.[99]

Analysis of implications

93. The Law Society does not believe that there is a convincing case for changing the current position.[100] As *Smith and Others* shows, the HRA not only provides protections for those local to the area but also for UK armed services personnel and other state agents who are deployed or stationed there. Limiting extraterritorial application of the HRA risks impacting on our own citizens and preventing them from accessing the protection of the court, should their rights be infringed. In our opinion, it is unlikely that such impact could be avoided, as even if an amendment was made that attempted to maintain protections only for state agents (excluding local inhabitants) this would likely be in breach of the prohibition of discrimination.

94. Beyond this, attempting to limit responsibility for acts of public authorities taking place abroad undermines the object and purpose of the ECHR to promote respect and protection for human rights. The relevance of this as a significant consideration in questions of extraterritorial jurisdiction was first acknowledged by the ECtHR in *Cyprus v Turkey,* where the principle of extraterritorial application was established in part with reference to "*the terms used and the purpose of the Convention as a whole".*[101] Reference to the object and purpose of the Convention has continued to be evident in successive ECtHR judgments and, as a signatory to the Convention, is one that the UK is committed to.

95. Amendment of the HRA to limit extraterritorial application would have further perverse consequences for the advancement of human rights and for the rule of law overall. It would create a situation whereby public authorities are bound by human rights obligations at home, but free to violate them elsewhere. In the words of Judge Bonello in his concurring opinion in *Al-Skeini*:

    "…[a]ny state that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not . . . belong to the comity of nations for which the supremacy of human rights is both mission and clarion call."[102]

    Amendment would risk creating impunity for potentially serious human rights violations committed by UK state actors domestically, and therefore increase the likelihood of the

[98] *Ibid.,* para. 46
[99] *Ibid.,* para. 50
[100] The Law Society – and numerous others – have raised similar concerns during the passage of Overseas Operations (Service Personnel and Veterans) Bill which would limit the ability of potential claimants – including soldiers – to rely upon the HRA for acts arising during an overseas operation. For further information see: https://www.lawsociety.org.uk/en/topics/human-rights/overseas-operations-service-personnel-and-veterans-bill
[101] Cyprus v. Turkey, Apps. 6780/74 and 6950/75 ECHR 1975
[102] Al-Skeini v United Kingdom, App. 55721/07 ECHR 2011, Concurring opinion of Judge Bonello, para. 18

UK being found to have breached the ECHR. Ultimately this will damage the international reputation of the UK as a champion of human rights and the rule of law and will undermine our ability to hold other states to account for human rights abuses.

96. Finally, something must be said of the relationship between human rights and humanitarian law. It is sometimes argued that in the context of armed conflicts, only humanitarian law should apply. However, it is the consistent approach of international courts that in such contexts it is not an 'either, or' decision. Humans rights law is interpreted through humanitarian law. The compatibility of these two branches was confirmed in *Hassan v UK,* where the ECtHR effectively read down Article 5 to enable prisoner insurgents to be detained lawfully as long as they were detained in accordance with the Geneva Conventions, even though there had been no formal permitted ground of detention under Article 5.[103] Detention that complied with the rules (including procedural safeguards) of international humanitarian law would not be arbitrary. This provided a principled and pragmatic approach to reconciling human rights and humanitarian law, taking into account the realities of armed conflicts.

Conclusion

97. We therefore consider that the current position is the correct one. The exceptions established are rightly restricted and their limits have been clarified. Only in circumstances where the UK is exercising control of an area that is akin to that exercised domestically would it be obligated to secure the full range of the Convention rights, otherwise the ability to divide and tailor the rights protected ensures that it does not face an unrealistic burden. Through decades of case law the ECtHR has provided careful and principled analysis, arriving at a well-balanced position that accommodates the competing interests of upholding human rights protections without stretching the Convention beyond its limits.

Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

98. The power to make a remedial order to amend primary legislation under section 10 of and schedule 2 to the HRA arises following a section 4 declaration of incompatibility from a domestic court or an adverse judgment from the ECtHR. It is one of the options available for rectifying a breach (another being bringing forward an amendment through the normal legislative process) and offers a fast-track means of making an amendment to "*ensure that clear breaches of human rights can be dealt with swiftly, rather than waiting for a legislative slot which can often take months if not years*."[104]

Parliamentary scrutiny

99. Arguments made for amending this process centre on insufficient parliamentary scrutiny. Remedial orders are an executive act which alter primary legislation but cannot be amended by Parliament – only approved or rejected. This gives greater power to the executive over a legislative issue, leading the JCHR to say that "*as a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill*".[105] This argument has greater strength when the matter for amendment is more substantial or complex.

[103] Hassan v United Kingdom, App. 29750/09, ECHR 2014

[104] Liberty, '*A Parliamentarian's Guide to the Human Rights Act*' (2010), p.9. Available at: https://www.refworld.org/pdfid/4ed640552.pdf

[105] Joint Committee on Human Rights, '*Making of Remedial Orders, Seventh Report of 2001-02*' (2001), para. 32. Available at: https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5803.htm#a3

100. An element of parliamentary scrutiny does however exist. Ultimately, Parliament has the power to reject the change if it disagrees and this is bolstered by the role of the JCHR. The JCHR is required to review the remedial order and report to both Houses of Parliament as to whether special attention to it is needed, including on the same grounds that the Joint Committee on Statutory Instruments provides scrutiny that it makes an *"unusual or unexpected use of the powers".*[106] This would include flagging if the order goes beyond what is required in the related court judgment or otherwise exceeds the limits of the power. The JCHR has the ability to engage with Government upon reviewing the remedial order and recommend, if necessary, that the amendment would be better made by introducing a Bill to Parliament. If this recommendation is not taken forward, then the JCHR can subsequently recommend in its reports to the Houses that the order be rejected and that the amendment should proceed through the full legislative process.

101. In practice, remedial orders are used in moderation. A search of legislation.gov.uk shows that fourteen remedial orders have been issued by the executive since the HRA came into force.[107] The Government tends to address incompatible primary legislation through the normal legislative process,[108] reserving remedial orders for either urgent or minor technical amendments. Recent examples of orders made in response to the judgments in *Siobhan McLaughlin, Re Judicial Review (Northern Ireland)*[109] and *Jackson and Others v Secretary of State for Work and Pensions*[110] demonstrate how remedial orders are used to give effect to a judgment within its confines, where the amendment is not a question of overall policy direction but of eliminating an inconsistency or omission.

Delays

102. Modifying the remedial order process could have the unintended consequence of increasing delays. The JCHR has said that "*in many cases it may be easy to remove an incompatibility by means of a short Bill which could be drafted quickly and passed speedily through both Houses*".[111] However, they also acknowledged that where the legislative timetable is fully occupied and waiting for a slot could involve significant delay, a remedial order would be necessary as the need to rectify incompatibilities should be given high priority.[112] The question posed by this panel does not seem to suggest removing the remedial order process entirely, but amending to increase the role of Parliament. This could, in theory, be achieved by allowing time for debate and/or the ability of Parliament to amend the order. However, this could both increase pressures on the parliamentary timetable and slow the process down significantly. This then risks negating the intention behind the remedial order process, which is to ensure that a timely remedy is provided to the individual concerned in the original judgment and prevent an ongoing breach of human rights obligations. In urgent cases involving the life, liberty, safety or security of individuals, delays would have particularly damaging consequences.

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[106] House of Commons, Standing Orders, Public Business 2017, HC 4, 152(B), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, 72(c)

[107] See: https://www.legislation.gov.uk/primary+secondary?title=%22remedial%20order%22 (accessed 16 February 2021).

[108] Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' (2015), p.22 Available at: https://discovery.ucl.ac.uk/id/eprint/10072227/

[109] Siobhan McLaughlin, Re Judicial Review (Northern Ireland) [2018] UKSC 48

[110] Jackson and Others v Secretary of State for Work and Pensions [2020] EWHC 183 (Admin)

[111] Joint Committee on Human Rights, Making of Remedial Orders, Seventh Report of 2001-02 (2001), para. 32. Available at: https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5803.htm#a3

[112] *Ibid.*, para. 33

103. The Law Society would again reiterate our caution that the panel take into consideration the sum and consequent impact of any recommendations it makes as a package. Any amendments made to the remedial order process are also impacted on by any amendments made to the use of section 3 (interpretation of legislation) and section 4 (declarations of incompatibility). As discussed above, if the ability of judges to use section 3 interpretations is reduced in favour of increased use of declarations of incompatibility, this will lead to more decisions on how to rectify incompatible legislation being put before Parliament. If this is combined with a greater role for Parliament in scrutinising and amending remedial orders, then the burden placed on the parliamentary timetable could be substantial, leading to significant delays and weakening their ability to provide enforcement and protection of human rights.

Using the remedial order process to amend the HRA

104. One further area of contention has arisen recently in relation to the Government's response to the judgment in *Hammerton v UK*[113] through The Human Rights Act 1998 (Remedial Order) 2019. This order amended section 9(3) of the HRA, raising the question of whether the remedial order process could be used to amend the HRA itself.

105. Section 10 only refers to remedial orders being capable of amending "*a provision of legislation*", leaving some ambiguity as to whether this includes the HRA. As the empowering statute, it would be unusual for Parliament to have intended that it be capable of being used in this way. Analysis from the Policy Exchange think tank, citing judicial precedent, has argued that where there is any doubt about the scope of an executive power, a restrictive approach must be applied.[114] On this point we agree.

106. We also agree with the discussion from Policy Exchange of the importance of the HRA as a constitutional measure.[115] In confirming the rights and freedoms owed to all people in the UK, the HRA is legislation with significant constitutional importance and is often afforded the status of a constitutional statute. The ability then to amend it through executive order with reduced scrutiny is somewhat problematic. We therefore believe this is an issue the panel could consider.

Conclusion

107. In principle, the Law Society is not opposed to enhancing the role of Parliament in the remedial order process. However, the merits of this have to be weighed against the impact on the ability to provide a swift resolution. The remedial order process was carefully crafted to balance the interests of swift justice and parliamentary sovereignty. We believe the latter of these interests is better served, on balance, by making full use of the mechanisms already provided through scrutiny from the JCHR. However, whether it is right that the remedial order process can be used to amend the HRA itself requires some further consideration which the panel could provide.

[113] Hammerton v United Kingdom, App. 6287/10 ECHR 2012

[114] Policy Exchange, *'Against Executive Amendment of the Human Rights Act 1998'* (2020), p.16-17. Available at: https://policyexchange.org.uk/wp-content/uploads/Against-Executive-Amendment-of-the-Human-Rights-Act-1998.pdf

[115] *Ibid.,* p.18-19